RE-ENTRY POLICY STUDY COMMISSION

INFORMATION ABOUT EQUAL EMPLOYMENT AND DISCRIMINATION

Provided by the United States Equal Employment Opportunity Commission (EEOC), Indianapolis District Office

EEOC MESSAGES
ARREST/CONVICTION RECORDS AS SCREENING DEVICES

Each year, more than 700,000 people are released from state and federal prisons. Another 9 million cycle through local jails. When reentry fails, the costs—both societal and economic—are high. Being employed is an important predictor of a former prisoner's ability to remain law-abiding; however, the barriers to employment for this population are huge.

In the United States today, an estimated one in four adults now have an arrest or conviction record that can show up on a routine criminal background check for employment. Fifty percent of all males have been arrested at one point in their lives.

State governments have criminal records on an estimated 65 million people. Many arrest and conviction records are automated and searchable online—some records may show arrests that led to no further criminal records, others may have resulted in convictions and prison sentences.

It is not explicitly illegal to use arrest and/or conviction records as screening devices. In many instances, however, their use may violate Title VII.

The EEOC does not have the authority to "ban" or "outlaw" all uses of arrest and conviction records or other screening devices, despite misinformation about this in the press. It is the use of the information that might constitute an illegal employment decision.

Since its first guidance on the subject of arrest and conviction records in the 1980s, EEOC has advised employers that their use of arrest or conviction records should be undertaken carefully to ensure that employment opportunities are not denied inappropriately.

Supreme Court precedents describe two ways in which discrimination may be proved: disparate treatment and disparate impact, both of which apply to this use.

I. Disparate Treatment—treating one group less favorably than another because of a prohibited basis such as race, sex, national origin, religion or color.

- It is unlawful to apply any screening device to only one group of individuals and not another.
- Example: it is unlawful to use conviction records to deny jobs to African-Americans while permitting other applicants with similar convictions to be hired.

II. Disparate Impact—using a facially neutral policy that has a greater impact on one protected group and is not job-related and consistent with business necessity.

- Because incarceration rates for different groups of people vary greatly, reliance on conviction records may have a disparate impact on those groups.
- Example: African-Americans, Hispanics and men have greater conviction and incarceration rates than the rest of the population. Using conviction records, therefore would disproportionately screen out these groups from consideration.

- Arrest Records: because arrest records are not proof that a person did, in fact, commit an offense; and because there are great differences in the arrest rates of minorities compared to the general population, their use will almost always have a disparate impact on such groups.

III. Defenses to Findings of Disparate Impact—How Can Employers Show Job-relatedness and Business Necessity?

- Consistent EEOC policy guidance with respect to conviction records recommends a three-part test to determine whether the use of a conviction record is discriminatory:

  1. The nature and gravity of the offense;
  2. The time passed since the conviction or completion of the sentence
  3. The nature of the job in question.

Even if an employer can show job relatedness and business necessity, the use of conviction records may still be unlawful if there are less discriminatory alternatives available to accomplish the same ends.

IV. States' Responses to Use of Criminal Records

Twenty-four states enacted laws in 2010 and 2011 that limit the kind of criminal-background information employers can obtain or when they can request it.

- Three states (Connecticut, Massachusetts, and New Mexico) have adopted "ban the box" policies that prescribe the point at which an individual's criminal record may be revealed in the hiring process.
- Two states (North Carolina and Ohio) passed laws that create certificates that recognize an individual's rehabilitation and thereby reduce employment sanctions and disqualifications.
- Thirteen states (Arkansas, California, Colorado, Delaware, Indiana, Louisiana, Mississippi, North Carolina, Oregon, Rhode Island, South Dakota, Texas, and Utah), recognizing that old, minor offenses can plague job seekers years later, took positive steps to expunge and seal a number of low-level offenses.
- Five states (Colorado, Kentucky, Nevada, New York, and Virginia) created new rights for workers to more easily access identification documents and other information needed to secure employment.
- Three states (Colorado, Massachusetts, and North Carolina) adopted laws, in conjunction with other reforms, to limit the liability of employers that hire people with criminal records.

- The following states have enacted some provisions regarding criminal records:

1. Arkansas
2. California
3. Colorado
4. Connecticut
5. Delaware
6. Florida
7. Idaho
8. Indiana
9. Iowa
10. Kentucky
11. Louisiana
12. Massachusetts
13. Mississippi
14. New Mexico
15. New York
16. Nevada
17. North Carolina
18. Ohio
19. Oregon
20. Rhode Island
21. South Dakota
22. Texas
23. Utah
24. Virginia

Additional information can be found on the EEOC web site. Of specific interest to Commission members an article that addresses treatment and disparate impact under Title VII: "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,"can be reviewed at the following link: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.